

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

SEP - 5 1997

In the Matter of

Amendment of the Commission's  
Regulatory  
Policies to Allow Non-U.S.-Licensed Space  
Stations to Provide Domestic and  
International  
Satellite Service in the United States

and

Amendment of Section 25.131 of the  
Commission's Rules and Regulations to  
Eliminate the Licensing Requirement for  
Certain International Receive-Only Earth  
Stations

and

COMMUNICATIONS SATELLITE  
CORPORATION  
Request for Waiver of Section 25.131(j)(1)  
of the Commission's Rules As It Applies to  
Services Provided via the INTELSAT K  
Satellite

IB Docket No. 96-111

CC Docket No. 93-23  
RM-7931

File No. ISP-92-007

REPLY OF ICO GLOBAL COMMUNICATIONS  
TO FURTHER COMMENTS

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**REPLY OF ICO GLOBAL COMMUNICATIONS  
TO FURTHER COMMENTS**

ICO Global Communications ("ICO") hereby replies to the further comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") July 18, 1997 Further Notice of Proposed Rulemaking ("Further Notice") in the above captioned proceeding.<sup>1</sup>

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<sup>1</sup> *Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, FCC 97-252 (July 18, 1997) ("Further Notice").

## SUMMARY AND INTRODUCTION

The further comments in this proceeding overwhelmingly support the Commission's proposal not to apply an ECO-Sat test to requests to serve the United States or non-WTO route markets from satellites licensed by WTO member countries other than the United States.<sup>2</sup> Some commenters, however, urge the Commission to place impermissible conditions on requests involving non-U.S. licensees in direct contravention of the United States' obligations under the recently concluded World Trade Organization Agreement on Basic Telecommunications Services ("WTO Agreement").<sup>3</sup> Specifically, AT&T suggests that the Commission should apply the ECO-Sat test to WTO-member licensed entities as a means of enforcing compliance with the WTO Agreement. Other commenters urge the Commission to subject requests to serve the United States through the ICO system to a level of review to which other WTO-member licensees will not be subject, despite the fact that ICO is subject to the jurisdiction of a WTO member country -- the United Kingdom -- that has committed to open its domestic telecommunications market unconditionally to competition. The Commission should reject these proposals as anticompetitive, unnecessary and contrary to the commitments made by the United States under the WTO Agreement.

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<sup>2</sup> In referring to satellites "licensed" or "authorized" by non-U.S. WTO members or other foreign countries, ICO refers to satellites that have been licensed or are in the process of being authorized (including those that are in the process of being coordinated for ITU purposes) by a foreign administration.

<sup>3</sup> See Comments of AT&T Corp. ("AT&T Comments"); Joint Comments of Loral Space & Communications Ltd. and L/Q Licensee, Inc. ("Loral Comments"); Comments of TRW Inc. ("TRW Comments").

**I. THE COMMENTS OVERWHELMINGLY SUPPORT THE COMMISSION'S PROPOSAL NOT TO ADOPT THE ECO-SAT TEST FOR REQUESTS TO SERVE THE UNITED STATES OR NON-WTO ROUTE MARKETS FROM SATELLITES LICENSED BY WTO MEMBER COUNTRIES**

Commenters from all segments of the telecommunications industry -- including U.S.-licensed satellite operators -- share the Commission's view that the WTO Agreement supersedes the ECO-Sat test initially proposed by the Commission in these proceedings.<sup>4</sup> As the comments generally acknowledge, the WTO Agreement replaces the system of reciprocal trade relations, typified by the ECO-Sat approach, with a multilateral trade system that promises rapid liberalization of global telecommunications markets.

The United States, in particular, has pledged in its Schedule of Specific Commitments to open its telecommunications services markets to entry by foreign service providers without restriction, except for specific exceptions mandated by statute.<sup>5</sup> Having made this commitment, the United States and its regulatory agencies no longer are free to exclude foreign service providers authorized by WTO member countries from U.S. markets as a response to real or perceived restrictions on the participation of U.S. service providers in foreign markets.<sup>6</sup> Under the WTO Agreement, concerns about the openness of markets in

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<sup>4</sup> See Comments of AirTouch Communications, Inc. at 2; Comments of COMSAT Corporation ("COMSAT Comments") at 7; Comments of GE American Communications, Inc. ("GE American Comments") at 3; Comments of Globecast North America Incorporated at 2; Comments of Hughes Electronics Corporation at 6-11; Comments of Lockheed Martin Corporation ("Lockheed Comments") at 3; Loral Comments at 3; Further Comments of Motorola Satellite Communications, Inc. and Iridium LLC at 5; Comments of Orion Network Systems, Inc. in Response to Further Notice of Proposed Rulemaking at 4; Further Comments of Teledesic Corporation at 2-4; Supplemental Comments of TMI Communications and Company, Limited Partnership at 2; Comments of Winstar Communications, Inc. at 4.

<sup>5</sup> The United States has noted reservations for statutory restrictions on direct foreign ownership of radio licenses and COMSAT's exclusive right to links with Intelsat and Inmarsat. World Trade Organization, Group on Basic Telecommunications, Communication from the United States (Feb. 12, 1997).

<sup>6</sup> ICO's arguments herein refer to those satellite services, such as Fixed Satellite Service and Mobile Satellite Service ("MSS"), that are covered by the United States' commitment in the WTO Agreement. ICO does not address herein those satellite services --

(Footnote continues on following page.)

other WTO countries are the occasion for trade dispute procedures -- not unilateral denials of access. Accordingly, as the commenters overwhelmingly agree, the ECO-Sat test should not be applied to requests to serve the United States or non-WTO route markets from satellites authorized by WTO member countries.

Some commenters, however, urge the Commission to make unjustified exceptions to these principles that will not protect competition and will violate the commitments of the United States government under the WTO Agreement. These proposals reflect a profound misunderstanding of the WTO Agreement and must be rejected.

**A. Contrary To AT&T's Claim, The WTO Agreement Does Not Permit The Commission To Retain The ECO-Sat Test As A Means Of Monitoring The Implementation Efforts Of WTO Member Countries**

AT&T urges the Commission not to abandon its ECO-Sat test, even with respect to satellite operators licensed or authorized by WTO member countries. Specifically, AT&T argues that the Commission may apply the ECO-Sat test to requests to serve the United States through satellites licensed by WTO countries that "have made no or deficient commitments under the WTO Agreement," and may even use the ECO-Sat test to monitor the implementation efforts of WTO members that have committed themselves fully to open their markets.<sup>7</sup> AT&T argues that this action is necessary to protect competition and is consistent with the commitments of the United States government under the WTO Agreement. Neither of these claims is correct.

First, by complying with the WTO Agreement and declining to apply the ECO-Sat test the Commission will not deprive the United States of ample remedies for exclusionary

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(Footnote continued from previous page)

*i.e.*, Digital Audio Radio Service and Direct-to-Home Television Service -- not covered by that commitment.

<sup>7</sup> AT&T Comments at 1-12.

or anticompetitive conduct by other WTO member nations. To the extent a WTO member country fails to meet its market access commitments under the WTO Agreement, the United States is entitled to avail itself of the WTO trade dispute procedures. To the extent the conduct of any WTO member licensee harms, or poses a very high risk to, competition in the United States, the Commission and other responsible agencies retain their authority to deal with that conduct through post-entry antitrust enforcement. The goals of competition and open markets, therefore, can be fully served without the ECO-Sat test.

Second, and more fundamentally, the fact that some WTO members have made “no or incomplete commitments” or will not immediately implement the commitments they have made does not empower the FCC to exclude WTO-member licensees from the U.S. market. The United States and other countries that undertook to abide by the WTO Agreement were fully aware that some WTO members had made only partial commitments to open their markets, or had not agreed to implement their market access commitments immediately. Nonetheless, the United States agreed to treat all signatories equally and reserved no right, in its Schedule of Specific Commitments, to treat licensees of WTO members that had made partial commitments differently from licensees of other WTO members. In the absence of such a specific reservation of rights to discriminate among WTO members, the United States is obligated to honor its market access commitments and observe the most favored nation principle of the GATS in its dealings with all WTO members. Adoption of AT&T’s proposal would amount to an open repudiation of these obligations.

**B. The Commission Should Not Subject Requests To Serve The United States From ICO Satellites To Needless, Additional Review**

The Commission proposes to treat all requests to serve the United States from satellites authorized by WTO member countries the same -- *i.e.*, to presume in favor of granting requests to serve the United States from those satellites, subject to an opponent’s showing that such entry poses a very high risk of harm to competition in the United States

satellite market.<sup>8</sup> Such parity of treatment also must extend to ICO satellites. ICO will own and operate the space segment of its global MSS system subject to the jurisdiction and regulatory requirements of the United Kingdom. Under the market access commitments made by the United States government and the most favored nation and national treatment principles of the GATS, ICO must be accorded the same treatment as any other satellite system authorized by a WTO member country.

Some commenters, however, urge that applications to serve the United States from ICO satellites must be subjected to additional review, not imposed on other WTO-member authorized satellite operators, that may result in delay or denial of authorizations to serve the United States through ICO satellites. TRW, for example, contends that applications involving ICO satellites must trigger an inquiry into the competitive implications of the supposed “many fundamental ties . . . between Inmarsat and . . . ICO . . . .”<sup>9</sup> Similarly, Loral Space & Communications, Ltd. and L/Q Licensee, Inc. (“Loral”) argue that no application to serve the United States through an ICO satellite may be granted until the Commission has concluded a comprehensive rulemaking concerning the treatment of

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<sup>8</sup> Further Notice at ¶ 35. As ICO stated in its further comments in this proceeding, the proposed “competitive harm” test will violate the WTO Agreement if that test is used for any purpose other than the exercise of the Commission’s jurisdiction to enforce the antitrust laws of the United States. Further Comments of ICO Global Communications at 7. Specifically, the competitive harm test may not be used to deny access to the United States satellite market on the basis of trade concerns that must be resolved through WTO trade dispute procedures. *Id.* at 9.

<sup>9</sup> TRW Comments at 6.



unknown, future Intergovernmental Satellite Organization (“IGO”) affiliates.<sup>10</sup> These proposals are anticompetitive, unnecessary and violative of the WTO Agreement.

**1. ICO’s Origins In An Inmarsat Project Do Not Pose A Risk Of Harm To Competition In The United States**

ICO, unlike the unknown “future IGO affiliates” as to which the Commission has expressed competitive concerns,<sup>11</sup> is an existing entity organized, in consultation with the United States government, to obviate any likelihood that ICO will benefit unfairly from its origins in Inmarsat or the continuing, minority investment of Inmarsat in ICO. Specifically, as a result of Assembly of Parties deliberations, ICO since its inception has been organized as a private, commercial entity that is constitutionally, managerially and operationally entirely separate from Inmarsat.<sup>12</sup> Although ICO’s list of investors includes Inmarsat members, those investors participate in ICO outside of their signatory roles and have independently chosen their level of investment and their investment vehicles.<sup>13</sup> Non-

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<sup>10</sup> Loral Comments at 13-18; *see also* Comments of Columbia Communications Corporation (“Columbia Comments”) at 3; GE American Comments at 5-7.

<sup>11</sup> Further Notice at ¶ 36.

<sup>12</sup> The United States was part of the Assembly of Parties that agreed to the spin-off from Inmarsat that resulted in the formation of ICO, and was involved in both the associated Inmarsat and WTO processes. The United States expressly agreed to the creation of the new entity, and approved the principles under which the spin-off would operate as “acceptable to the United States to assure fair competition in handheld [MSS] services.” Statement by the Representative of the Party of the United States of America in Annex V to the Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly (Dec. 13, 1994).

<sup>13</sup> Some Inmarsat members have invested in ICO through their signatory entities, while others have participated through separate affiliates, separate subsidiaries or, in one instance, a syndicated investment. Other Inmarsat signatories have chosen to invest in other Big LEOs or not at all. *See* initial Comments of ICO Global Communications at 43 and Exhibit A (July 15, 1996).

Inmarsat investors also participate in ICO as investor-partners, wholesalers and syndicated partners.<sup>14</sup>

As an entity managerially and structurally independent of Inmarsat, ICO enjoys no governmental privileges, immunities or other advantages of any kind.<sup>15</sup> An examination of the MSS experience so far demonstrates that ICO's competitors have had as much success as ICO in securing service agreements and strong partners in international markets.<sup>16</sup>

In addition to achieving structural and managerial independence from Inmarsat and its members, ICO has worked closely with the United States government to obviate any concerns about potential, anticompetitive advantages arising from ICO's origins in an Inmarsat project. Notably, in May of 1996, in connection with the COMSAT procurement application, ICO's board voted to incorporate in ICO's organic documents the Inmarsat Principles as requested by the United States Executive Branch. The Inmarsat Principles

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<sup>14</sup> For example, NEC has joined ICO as a strategic partner through an equity investment in ICO. NEC, along with a consortium of companies that includes Hughes Network Systems and Ericsson, also will deliver ICO's ground systems equipment under a contract estimated at approximately \$500 million. Hughes joined ICO in 1995 as a strategic partner and has a \$2.3 billion contract to build and launch ICO's space segment. In addition, ICO is likely to broaden its ownership structure through various means, including an initial public offering.

<sup>15</sup> In most of the large countries or groups of countries where ICO will operate, including China, the European Union, India and Russia, the entity that will make the regulatory decisions concerning market access is entirely separate from the operational entities that are ICO investors. As a result, ICO expects to compete vigorously, on an equal footing with its competitors, to secure the full range of licenses and service provider relationships needed to provide global MSS service.

<sup>16</sup> In fact, Edward Staiano, Chairman and Chief Executive Officer of Iridium, recently was asked whether "obtaining licensing and regulatory approval have been more difficult than [Iridium] expected." Mr. Staiano replied that "[n]o one has shut the door on us. In some areas the process has been more cumbersome and it's taken longer, [but] [w]e've also had some very pleasant surprises." *Space News*, Sept. 1-7, 1997.

include a number of commitments to open and nondiscriminatory operation, including nondiscriminatory access to national markets for all MSS networks, broad and open ownership and a prohibition on cross-subsidization between ICO and Inmarsat.<sup>17</sup> The United States has expressed its satisfaction with these measures, and effectively has confirmed that concerns about ICO's independence from Inmarsat have been obviated. As Steven W. Lett, Deputy United States Coordinator for International Communications and Information Policy, recently stated in testimony before the Subcommittee on Communications of the Senate Commerce, Science and Transportation Committee:

The United States accepted [ICO's creation], but insisted on ensuring that the relationship between Inmarsat and ICO would be such that ICO would function as an independent company, not benefiting from Inmarsat's intergovernmental status nor, particularly, from its privileges and immunities. It appears that this policy has been largely successful. ICO does seem to be functioning independently and shows promise as a genuine alternative in a competitive market.<sup>18</sup>

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<sup>17</sup> The Inmarsat Principles are set out in the Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly at Annex IV, Views of The Council on the Principles Listed by The Intersessional Work Group Regarding the Formation of the Inmarsat-P affiliate (Dec. 13, 1994) and include commitments to ensure that "[a]s a private United Kingdom company, the [new entity] will have no treaty-based privileges and immunities," will not engage in cross-subsidization with Inmarsat, will have broad and open ownership and "will not seek exclusive authorization to provide services in any country or region." The prohibition on cross-subsidization, in particular, is reinforced by requirements for separate accounting systems, arms-length dealings between Inmarsat and the new entity and a prohibition on the ownership of any operating property in common between Inmarsat and the new entity. The Executive Branch made ICO's adoption of the Inmarsat Principles a condition of Executive Branch approval of COMSAT's contribution to Inmarsat for Inmarsat's investment in ICO. See Letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce and Vonya B. McCann, United States Coordinator for International Communications and Information Policy, U.S. Department of State, to Mr. Reed Hundt, Chairman, Federal Communications Commission (Dec. 6, 1995).

<sup>18</sup> Prepared Testimony of Steven W. Lett, Federal Information Systems Corporation Federal News Service (July 30, 1997).

Because of its independence from Inmarsat and its commitment to competition, ICO presents no risk of harm to competition in the United States satellite market. To require an additional inquiry, specific to ICO, would be contrary to the WTO Agreement and the spirit in which ICO has worked with, and accommodated the concerns of, the United States government in the years since ICO's founding.<sup>19</sup>

## **2. ICO Should Not Be Part Of Any Inquiry Into The Competitive Issues Posed By Future IGO Affiliates**

The Commission suggests in the Further Notice that because future IGO affiliates might be structured with less than complete independence from the IGOs with which they are affiliated, those entities might present competitive concerns that the Commission is entitled to consider in reviewing requests to serve the United States through satellites operated by those entities.<sup>20</sup> Loral goes beyond the Commission's suggestion and urges the Commission to delay decision on any request to serve the United States from ICO satellites until completion of a rulemaking on the subject of regulatory treatment of IGO affiliates.<sup>21</sup>

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<sup>19</sup> Imposition of an additional level of inquiry on ICO also would create a severe competitive imbalance, as well as serious delay and uncertainty, in the MSS industry. The U.S.-licensed MSS operators already are projecting commencement of operations two years in advance of ICO. If ICO is subjected to additional regulatory burdens, such as the inquiry proposed by TRW and Loral and the proposed imposition of relocation costs in connection with the allocation of radio spectrum at 2 GHz to MSS, the development of a competitive MSS industry will be even further delayed, to the detriment of ICO and consumers alike. See The United Kingdom Government's Comments on the Petition of the MSS Coalition for Partial Reconsideration, *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by Mobile-Satellite Service*, ET Docket No. 95-18 (June 30, 1997) at 2; see also Comments of the European Union, Docket No. 95-18 (filed with the Department of State on July 31, 1997).

<sup>20</sup> Further Notice at ¶¶ 35-36.

<sup>21</sup> Loral Comments at 6-18.

As noted above, ICO specifically has been structured to obviate concerns about its independence from Inmarsat and its members. As the letter of February 12, 1997 from Charlene Barshefsky, United States Trade Representative - Designate makes clear, the ongoing interest of the Executive Branch concerning IGO affiliates is directed only to “*future* privatized affiliate[s], subsidiar[ies] or other form[s] of spin-off from the ISOs. that would likely lead to anti-competitive results.”<sup>22</sup> As Ms. Barshefsky’s letter also makes clear, the Executive Branch’s interest focuses on the proposed restructuring of INTELSAT New Corporation (“INC”).<sup>23</sup> As ICO’s agreement to incorporate the Inmarsat Principles illustrates, ICO already has accommodated the Executive Branch’s concern about independent operation of ICO. This accommodation, in turn, fully justifies the Executive Branch, and the Commission, in treating ICO satellites the same as any other satellites authorized by non-U.S. WTO member countries, and to make further inquiries only into the structure and operation of *future* IGO affiliates.<sup>24</sup>

Against this background, inclusion of ICO in any rulemaking or other inquiry concerning the competitive implications of future IGO affiliates would delay competition in

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<sup>22</sup> Letter from Charlene Barshefsky, United States Trade Representative - Designate, to Ken Gross *et al.* at 2 (Feb. 12, 1997) (emphasis added).

<sup>23</sup> *Id.* (“As you are aware, however, many INTELSAT members are resisting the idea of independence for INC and we believe that a failure to achieve independence could adversely affect competition in the U.S. satellite services market.”). Ms. Barshefsky’s letter expresses no similar concerns about the independence of the ICO system, and nowhere suggests that the Executive Branch will engage in further, post-WTO Agreement review of the operational independence of ICO or its impact on competition in the U.S. satellite market.

<sup>24</sup> See Further Notice at ¶¶ 35-36 and n. 30. As ICO pointed out in its initial comments in this proceeding, ICO cannot properly be classified as an IGO affiliate, much less a *future* IGO affiliate. Further Comments of ICO Global Communications at 42.

the MSS market and undercut ICO's right, having fully accommodated the competitive concerns of the Executive Branch, to be treated on the same footing as any other operator authorized by a WTO member country. Accordingly, the Commission should reject the argument that ICO warrants different treatment from other satellite operators licensed or authorized by a WTO member country.<sup>25</sup>

**II. THE COMMENTERS AMPLY SUPPORT THE VIEW THAT SATELLITE OPERATORS LICENSED OR AUTHORIZED BY OTHER COUNTRIES SHOULD NOT BE REQUIRED TO PROVIDE THE SAME INFORMATION TO THE COMMISSION AS A SATELLITE OPERATOR SEEKING A LICENSE ISSUED BY THE UNITED STATES**

Of those commenters that address the issue, most agree that the Commission need not require satellite operators licensed or authorized by other countries to provide all of the same information as a satellite operator seeking a license issued by the United States.<sup>26</sup> As these commenters point out, requiring the filing of redundant information would subject non-U.S. licensees to wasteful "relicensing" requirements of the kind the Commission already has stated its intention to avoid. Such requirements also would violate fundamental

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<sup>25</sup> The Commission also should ensure that any inquiry into future IGO affiliates is consistent with the WTO Agreement. Notably, the Commission may not use a WTO-member licensed satellite operator's affiliation with an IGO as the basis for rules or decisions that violate the market access commitments of the United States or the most favored nation and national treatment principles of the GATS.

<sup>26</sup> See Columbia Comments at 7 (requesting "from non-U.S. satellite operators much of the same information required from U.S. applicants . . . would be unnecessarily burdensome and would set a poor example for other nations implementing the WTO Agreement"); Lockheed Comments at 2 (advocating "avoidance of any action that would constitute 're-licensing' of a system"); Comments of Hughes Electronics Corporation at 20 (stating that "requiring full compliance with all of the Commission's information filing requirements could redound to the detriment of U.S. operators that seek to serve multiple foreign markets"). See also GE American Comments at 10; COMSAT Comments at 20-21.

principles of national sovereignty and administrative comity and invite retaliatory measures by other countries against U.S. licensees. Accordingly, the Commission should require non-U.S. licensed operators to provide only such technical and program implementation information as is needed for national security, law enforcement and international and domestic frequency coordination purposes.

## CONCLUSION

The further comments in this proceeding reflect strong support for the Commission's proposal to abandon the ECO-Sat test in favor of a streamlined evaluation process for WTO member licensed satellite operators' requests to provide MSS service to the United States and non-WTO route markets. The Commission's proposed approach applies with equal force to all requests from operators of satellites authorized by WTO-member countries, including ICO. For the reasons stated herein and in ICO's further comments, the Commission should adopt the streamlined approach proposed in the Further Notice; require a showing of harm to national security or law enforcement concerns in order to overcome the presumption that a satellite operator authorized by a WTO member country is eligible for streamlined treatment; and reject its proposal to require non-U.S. licensed satellite operators to provide redundant legal and financial information.

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I, Kimberly E. Thomas, do hereby certify that the foregoing **REPLY OF ICO GLOBAL COMMUNICATIONS TO FURTHER COMMENTS** was hand delivered on this 5th day of September, 1997, to the following:

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